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Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM,

NO.

CENTRAL GULF STEAMSHIP CORPORATION,
Petitioner,

versus

GABRIELLE JOAN DENNIS, Individually and in the Alternative, ANNA MAE DENNIS MALET, widow of M. MALET, Petitioner, and/or Curator of the Interdict, GABRIELLE JOAN DENNIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals of the Fifth Circuit entered in the above case on January 4, 1972 and the denial by the said Court of petition for rehearing on February 25, 1972.

CITATION TO OPINIONS BELOW

The Findings of Fact and Conclusions of Law and judgment of the United States District Court for the

Eastern District of Louisiana, New Orleans Division, are reproduced in the Appendix. The case is also reported at 323 F. Supp. 943. The opinions of the United States Court of Appeals for the Fifth Circuit are reproduced in the Appendix and are reported at F. 2d.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 4, 1972. A timely petition for rehearing was filed and rehearing was denied on February 25, 1972. The jurisdiction of this Court was invoked under 28 U.S.C. 1254 (1). The jurisdiction of the District Court was invoked under the Admiralty and Maritime jurisdiction of the United States.

QUESTIONS PRESENTED

1. Does the maritme law, as stated by this Court, in *Moragne v. States Marine Lines*, 398 US 375, provide damages in death action based not on decedent's loss but on survivors' loss alone?

2. Does the maritime law of the United States provide damages to beneficiaries for only pecuniary loss to them, or does it also include the decedent's damages for pain and suffering prior to death?

3. Can State law broaden benefits awarded under maritime law for death without intervention of Act of Congress?

4. Does maritime death action uniformity need override holding based on maritime but local rule application?

5. Does the maritime law of the United States provide for funeral expenses as an element of damages for wrongful death?

STATUTES INVOLVED

By analogy, *Death on the High Seas Act*, 47 USC 761 & 762, and the *Jones Act*, 46 USC 688.

STATEMENT OF THE CASE

On August 7, 1965, Joseph A. Dennis, a marine surveyor employed by the United States Maritime Administration, went aboard the S/S GREEN BAY while it was moored in the Mississippi River at New Orleans, Louisiana to determine the ship's condition and inspect its holds, ladders, and equipment to see if they were in proper order. The purpose of this inspection was to determine the consideration to be paid in the trade of the vessel between the owner, Central Gulf Steamship Corporation, and the United States for another ship. At this time there was no crew aboard.

The S/S GREEN BAY was a C-2 SB 1 vessel built at the end of World War II in accordance with specifications by the United States Maritime Administration.

On the afternoon of August 7, 1965, Mr. Dennis started his inspection of No. 3 lower hold. During this inspection, an accident occurred. Mr. Dennis was accompanied, during his inspection tour, by the port engineer of Central Gulf, who did not descend the same ladder at that time. He chose an alternate route. However, at the time of the fall, Central Gulf's engineer had al-

ready reached the lower hold and saw the surveyor descending the ladder. He saw the surveyor step from the pipe guard, which was approximately 4 ft. off of the deck, then fall backwards and strike his head. As a result of the fall, the surveyor suffered a right frontal skull fracture and remained in the hospital for eight and one/half months, conscious some of the time, but in a coma the rest of the time. After the eight and one/half months period, he died.

The surveyor, Mr. Dennis, was survived by one major daughter, Gabrielle Joan Dennis. On August 3, 1966, a suit was filed by Miss Dennis as dependent and forced heir of her deceased father, Joseph A. Dennis. The suit alleged that Central Gulf Steamship Corporation failed to provide Mr. Dennis with a seaworthy vessel and that they were negligent in failing to warn and instruct him of dangers and hazards present aboard the vessel including the particular ladder. They sought to invoke jurisdiction under the Jones Act, the general maritime law including the warranty of seaworthiness, and further, under the law of the State of Louisiana. By the time of the pre-trial conference on October 15, 1970, the jurisdiction question had been narrowed down to a claim under the general maritime law as expressed by this Honorable Court in *Moragne v. States Marine Lines, Inc.*, 398 US 375 (1970), along with an allegation of diversity jurisdiction.

The case was heard without a jury and at the close of the plaintiff's case, the Court entered a judgment of dismissal of the unseaworthiness count on the basis that the plaintiff was not a member of the crew of the vessel nor was he doing work traditionally done by a seaman.

The Court then applied the duty of exercising reasonable care as stated by this Court in *Kemerec v. Compagnie Generale Transatlantique*, 358 US 625 (1958).

Applying the standard of reasonable care, the Trial Court found Central Gulf negligent and found no contributory negligence on the part of the decedent.

The plaintiff, Miss Dennis, was a major child who had lived with her father and because of certain psychological difficulties was dependent upon him.

The Court awarded damages first for loss of support of the plaintiff in the amount of $18,854. Then the Court allowed plaintiff to recover for certain damages belonging to the decedent which consisted of decedent's pain and suffering in the amount of $20,000 and decedent's lost wages in the amount of $10,752.50 during his period in the hospital. Additionally, the Court allowed $923.43 in funeral expenses and allowed plaintiff damages for loss of services by her father in the amount of $5,030.40 for a total of $55,570.33.

REASONS FOR GRANTING THE WRIT

In this Court's opinion in *Moragne*, supra, it left as "Grist for the judicial mill," the particular questions of damages, 398 US 48. The judicial mills below this Court have come to an impasse. During the almost two years since this Court's decision, there has developed a complete dichotomy between certain of the Courts of Appeal.

In *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970), cert. den. 402 US 987, reh. den.

403 US 924, 403 US 940, the Sixth Circuit held that damages against a non-employer for a maritime death would be limited to the traditional maritime damages of pecuniary loss. So also did the Ninth Circuit in *Simpson v. Knutsen*, 44 F.2d 523 (9th Cir. 1971). In *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3rd. Cir. 1971), the Third Circuit clearly recognized that the maritime law and the Death on the High Seas Act provided only for pecuniary loss to beneficiaries of the decedent but allowed additional damages under the Pennsylvania survival statute. Against this background now comes the Fifth Circuit in the instant case and states that:

> "The decedent's conscious pain and suffering is not a pecuniary loss suffered by the decedent's beneficiaries but most states, by survival action statutes, provide a recovery for such damages."

Yet in the next breath, the Court stated:

> "Recovery for this element of damages was properly permitted by the District Court under the general maritime law."

The dichotomy created by the Fifth Circuit in this case presents now a need for this Honorable Court to settle the difference in order to preserve uniformity consistent with these federal rights. The conflict between circuits merits this Court's discretionary consideration of this matter. *Supreme Court of the United States Revised Rules*—Rule—19.

The primary question presented is simply what is the proper remedy for a maritime wrongful death. The answer given by the Fifth Circuit in the instant case is not only contrary to the rule of law established in other

circuits but also raises corollary questions of federal importance if allowed to stand.

After the *Harrisburg*, 119 US 199 (1886), and up to *Moragne*, supra, there were no maritime wrongful death actions in the opinion of this Court. Congress then legislated following this decision in areas they thought to be within their power. They passed two acts within a short time of each other. First, the Death on the High Seas Act for death under maritime circumstances in waters beyond the control of the states was passed. *Death on the High Seas Act*, supra. They also passed what is commonly called the *Jones Act*, 46 USC 688, which governed the relations between seamen and their employers.

Congress specifically omitted in the Death on the High Seas Act any damages personal to the decedent himself and limited it to pecuniary loss to the survivors.

The position urged by the petitioner is that under the maritime law damages for wrongful death should be based on survivors' loss alone. This was the intent of Congress when not dealing with an employer-employee relationship as exemplified by the Death on the High Seas Act, which specifically omitted a section comparable to 45 USC 59 of FELA which was adopted by Congress in the Jones Act and which provides specifically for survival of decendent's personal action.

Historically there is no foundation for awarding anything more than pecuniary loss to survivors. This Court in over-ruling the *Harrisburg*, supra, specifically relied upon the fact that maritime law is based upon civil law and not the English common law, 398 US 386. Further-

more, unlike the common law, there has always been a remedy for wrongful death under the civil law. This action is not for the decedent's losses as this was a personal loss. *24 Pothier Pandectes*, p. 279, law 13; *Las Siete Partidas*, Part 7, Title 15, Laws 1 & 3. As the ancient Spanish law points out, recovery was only for the damages suffered by the survivors and the heirs of the decedent. *Las Siete Partidas*, Part 7, Title 9, Laws 11, 21 & 23.

The reasoning, as pointed out by the French Commentators Plainiol and Ripert, is that for the heirs or survivors to receive more than their pecuniary loss would constitute an unjust enrichment under civil law. *Plainiol, Ripert, Traiet, Pratique, De Droit, Civil Francais*, IV, No. 658, p. 890 (1930).

Thus, both historically and legislatively, damages for a wrongful death action in the maritime law as in civil law are for the survivors' loss alone. The exception of the Jones Act is a result of the concept of employment and does not apply to non-employers.

To reach the decision in the instant case, the District Court abandoned both statutory guidance and civil law guidance and rather turned to a synthesis of the various state statutes. This adoption of state law to broaden the maritime law was in contravention to the clear policy of this Court as to maritime law set down in *So. Pacific Co. v. Jensen*, 244 US 205 (1917).

As a result of the Fifth Circuit decision, not only do we have a split in our Circuit Courts but also a lack of uniformity in our national law. Under the maritime

law as it stands in the Fifth Circuit, the survivors of a maritime worker who suffers death outside of the state waters are entitled, under federal law, only to their pecuniary losses. Yet, under the same circumstances, if the maritime worker suffers death within state waters, his survivors are entitled to a broader range of damages including rights historically personal to the decedent. Thus, this decision, as it stands, destroys uniformity as requested by this Court in *Moragne*, supra.

Funeral expenses fall into the same category. They are not losses suffered by the heirs or survivors. The Fifth Circuit acknowledged, as did the Trial Judge, that funeral expenses would not come under pecuniary loss allowed by the Death on the High Seas Act. Again looking to state statutes, it was allowed. No effort is made to justify such an award under the maritime law or the civil law. The rule of the Death on the High Seas Act was rejected.

CONCLUSION

The decision in the instant case is directly contrary to the rule of law of the Sixth, Ninth, and Third Circuits. It completely ignores this Court's reliance on civil law. It completely ignores Congressional thought on damages for maritime wrongful death actions as expressed in the Death on the High Seas Act. It destroys national law uniformity by allowing different remedies based on geographical location.

Thus, it is submitted that this matter is one now meriting this Court's attention and one proper for the issuance

for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing petition for certiorari and accompanying brief has been served on Harold J. Lamy, Esq. and Charles G. Jacques, Jr., Esq. by depositing same in the U. S. mail, postage prepaid, this 23rd day of May, 1972.

ROBERT B. ACOMB, JR.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

FILED February 5, 1971

Civil Action No. 66-125 Section "C"

GABRIELLE JOAN DENNIS, INDIVIDUALLY
and in the alternative,
ANNA MAE DENNIS MALET,
WIDOW OF M. MALET,
PETITIONER AND/OR CURATOR OF THE
INTERDICT, GABRIELLE JOAN DENNIS

Plaintiffs

versus

CENTRAL GULF STEAMSHIP CORPORATION,
and/or THE ABC CORPORATION,
XYZ CORPORATION, and
THE PDQ INSURANCE CORPORATION

Defendants

Charles G. Jacques, Jr., Esq.
Harold J. Lemy, Esq.
Attorneys for Plaintiffs.
John R. Peters, Jr.
Attorney for Defendant.

RUBIN, District Judge:

Joseph A. Dennis, a Marine Surveyor representing the United States, went aboard the S S GREEN BAY while it was moored at the Charbonnet Street Wharf in New Orleans to determine the ship's condition, and inspect its holds, ladders and equipment to see if they were in proper order. His inspection was for the purpose of determining the cash consideration to be paid in a proposed trade of the vessel between the owner of the GREEN BAY and the United States for another ship.

Mr. Dennis was accompanied by Charles Wolff, the shipowner's Superintendent of Engineering. After inspecting two holds of the vessel on the morning of August 7, 1965, they went to lunch. Then they returned to the vessel and descended into the No. 3 hold to inspect it. One pontoon had been removed from the upper deck and scattered hatch boards had been removed from the upper and lower decks of this hold, so there was some natural light. Mr. Wolff and Mr. Dennis entered the hold from the midship house through a tunnel into the first tween deck section. They were proceeding to the bottom of the hold with the purpose of checking the hold from its bottom up. There were two bulkhead ladders in this hatch, one forward one aft. Wolff used the after ladder, Dennis used the forward one. Wolff was familiar with the vessel and with this hatch but Dennis had never been on the vessel before this day and had never visited this hatch. No reason was advanced by either party why Dennis chose a different ladder rather than follow Wolff.

When Wolff got down to the tank tops, the bottom of the hold, he looked for Dennis and saw his legs descending

the other ladder. The after ladder, which Wolff had used, had rungs all the way to the tank tops, but the forward ladder stopped about four feet above the tank tops just below the point where a horizontal guard rail had been installed to protect pipes in the lower hold from damage by cargo. To descend from the end of the ladder to the tank tops, it was necessary to climb on the guard rails which were about one and one-half feet out from the bulkhead. The ladder was recessed so, in order to step to the guard rails, a person descending the ladder had to step backward about twelve inches as well as down. The guard rails were of angle iron and were not installed horizontally but were slanted at a slight pitch.

The forward ladder in the No. 3 hold was the only ladder on the vessel constructed in this manner and there is no evidence that Dennis knew of its unique characteristics. Certainly Wolff said nothing to him about this in advance, because, Wolff said, he had expected Dennis to follow down the aft ladder.

When Wolff saw the descending legs, he took a flashlight he was carrying in his pocket, and focussed its beam on the forward ladder. Wolff testified that, when Dennis' feet reached the pipe guard, Wolff said, "Joe, you're on the pipe guard." He received no reply nor was there any indication Dennis heard the remark. But Dennis stepped back and fell to the tank top. Wolff thought he hit the back of his head but the medical report indicates clearly that Dennis' primary injury was a right frontal skull fracture. Wolff went over right away, but Dennis was unconscious. Wolff ran for help, and Dennis was removed from the hold and taken to the U. S. Public Health Service Hospital. He regained consciousness, but

remained critically ill, sometimes conscious, sometimes not, for eight and one-half months, when he died.[1]

Plaintiff, decedent's thirty-one year old daughter and sole survivor, sued on the basis that the vessel was unseaworthy, and on grounds of negligence. At the close of the plaintiff's case, the court entered a judgment of dismissal of the unseaworthiness count on the basis that the plaintiff was not a member of the crew of the vessel (compare *Filipek v. Moore McCormack Lines*, 2d Cir. 1958, 258 F.2d 734, rigging tester) nor was he doing seaman's work. *Patridge v. Pope and Talbot, Inc.*, N.D. Cal. 1965, 257 F. Supp 456; *Royston v. Pacific Far East*, N.D. Cal. 1960, 190 F. Supp. 450. However, it is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those aboard the vessel who are not members of the crew. *Kemerec v. Compagnie Generale Translantique*, 1958, 358 U.S. 625.

I. NEGLIGENCE

The location and manner of construction of the pipe guard at the bottom of the No. 3 forward bulkhead ladder, extending some four feet above the deck of the lower hold with a slanted surface of approximately thirty

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[1] Defendant contends that Dennis was never conscious. But the hospital record notes, for example: 7 Aug 1965 "Presently pt. is conscious, complains of some headache." Clinical Record: "At the time that the patient was brought to the emergency room he was ambulatory without assistance and complained only of headache." Then "On 8/10/65 the patient appeared less responsive and became somewhat comatose, responding only to painful stimuli by moving his extremities . . . Postoperatively the patient had a prolonged and somewhat difficult course remaining semi-comatose for approximately one week. Following this he showed some progressive increase in his state of consciousness and with the aid of physical therapy had been taught to walk. . . . He had some post prandial vomiting brought on mainly when he became grossly upset. He was completely incapable of managing his own affairs and required close care in the hospital to take care of his activities of daily living.

degrees, presented an unusual and hazardous condition. The defendant knew of this condition of course, and it could reasonably foresee that this might cause or contribute to an accident if a person who was unaware of this construction descended the ladder and had to climb down the pipe guard. Indeed, a qualified naval architect testified that the ladder presented an unusual and unsafe condition, and that he had never gone down a ladder with this type of construction during his entire experience as a mate, naval architect or marine surveyor. The slanted surface of the pipe guard was peculiary hazardous to someone coming down the ladder. Any moisture or foreign matter on the shoes of the person using the ladder or on the pipe guards themselves would make them extremely slippery.

When a person descends a ladder he comes down at a certain gait. The presence of this pipe guard would break the normal pattern of descent. The lack of a flat or level top surface to allow him to adjust to a change, and the further absence of any type of handrail to steady his course the remainder of the way, presented an unsafe condition. There were no warnings on the ladder or in the tween deck section to advise persons using the ladder that there was a pipe guard construction at the bottom of the ladder.

Nor is it any defense that this particular guard rail in all C-4 vessels was constructed in the same manner, if indeed it was—a matter that the evidence leaves in some doubt. Negligence does not become excusable because it is oft repeated. See Prosser, *Law Of Torts*, 170.

Neither is it sufficient that the vessel had been in-

spected by the American Bureau of Shipping and given the highest rating possible. There is no evidence that this particular guard rail construction was called to its attention and pronounced safe.

Of course Mr. Dennis could have requested that more than one pontoon be removed from the top deck and conceivably more light provided below. But there was no reason for him to foresee the need for this. Had the ladder been of the same construction as the ladders Dennis had already used in this vessel, it would likely have been unnecessary.

The medical records and the X-ray report clearly show that Dennis had a right frontal skull fracture. The hospital record does not indicate that he had any type of injury to the back of his head. Therefore it is likely that Dennis did not strike the back of his head, as Wolff thought, but rather hit the forward part of his head when he fell. This could have occurred if he slipped off the pipe guard on the slanted surface and struck his head either on the ladder or the pipe guard as he fell to the deck below. Therefore it is likely that he fell without warning, struck his head and knocked himself unconscious.

II. CONTRIBUTORY NEGLIGENCE

Dennis did not descend the ladder with the utmost of caution. But he was expecting a normal ladder, not one with a hazard. There was no way he could anticipate this ladder's unusual method of construction. He had no warning, nor any way to learn that he should be more careful than he had been in climbing down other ladders aboard the ship.

He had been a surveyor for thirteen years, and he had been an engineer for some twenty-five years. He was sober, in good health, and Wolff's testimony shows that he was descending the ladder in the usual and normal fashion. There is no basis for finding him contributorily negligent under the circumstances of this case.

III. DAMAGES

A. General Considerations

When this suit was filed, it seemed clear that, if the plaintiff recovered, the measure of damages would be fixed by Article 2315 of the Louisiana Civil Code. Now that proposition requires further study.

In *The Harrisburg*, 119 U.S. 199, the Supreme Court held that there was no right to recover for wrongful death under the general maritime law. The court there recognized that dependents of those who died in territorial waters could utilize state wrongful death statutes in federal court to recover.

In *The Tungus v. Skovgaard*, 1959, 79 S. Ct. 503, the Court considered the content of that right. Confirming the right to recover in admiralty under state statutes, it held that the federal courts were enforcing a *right* granted by a state "subject to the limitations which have been made a part of its existence." 79 S. Ct. at 506. A federal court's duty in a wrongful death case was to interpret the law of the state. Both the right of recovery and the limitations on that right were held to be those recognized by state law. Justice Brennan dissenting, with the concurrence of Chief Justice Warren and Justices

Black and Douglas, stated that, in his opinion, the right to recover was a federal one, and state limitations on it should not obtain. He drew a sharp distinction between the right created by federal law, and the utilization of a state remedy for recovery.

In *Moragne v. States Marine Lines*, 1970, ... U.S. ....., 90 S.Ct. 1772, the Supreme Court overruled *The Harrisburg* and decided that there was a right to recover for wrongful death under federal maritime law. It specifically declined to fix the proper measure of damages to be awarded under the new federal right.

To determine the measure of damages in this case, this court must first decide whether the right created in *Moragne* supplanted the right discussed in *The Tungus* or complemented it. If the decision in *Moragne* supersedes the rule of *The Tungus*, state wrongful death statutes no longer provide the measure of damages for death in coastal waters, and the rule fixing the items of damage now recoverable must be derived from other authorities. If *The Tungus* is still afloat, the Louisiana Death Statute may still provide the measure of damages for the plaintiff's claims in this case.

The opinion in *Moragne* does not expressly determine this issue. But it refers to *The Tungus* as the coroliary of *The Harrisburg* and it at least twice explicitly refers to *The Tungus* rule as permitting federal courts to adopt a *remedy* created by state law, rather than enforcing a state *right*.

One of the major reasons advanced for rejection of *The Harrisburg* was that the federal rule should be uni-

form nationwide. The majority opinion in *The Tungus* took the view that recovery was granted because the admiralty was adopting the State's right of action and hence "must enforce that right as an integrated whole, with whatever ambitions and limitations the creating State has attached." However, the dissent took the view that "The court has simply failed to grasp the important distinction here between duties and remedies . . . It is the federal maritime law that looks to the state law of remedies here. . ." Hence the reference by the Court in *Moragne* to State remedies, rather than to State rights, indicates a departure from *The Tungus* rationale.

These considerations all lead to the conclusion that the newly recognized federal right has abandoned *The Tungus* rule as derelict. That is the conclusion reached only a few days ago in *U.S. Steel v. Lamp*, 6 Cir. Dec. 23, 1970, Nos. 19835-36-37-38-39.[2]

Indeed, the concept that state law created a right to recover for death on state coastal waters had caused considerable difficulty. It was necessary to consider the substance of the state created right, *The Tungus*, supra, and its relationship to maritime law under the state laws of the various coastal states. See *Hess v. U.S.*, 1960, 361 U.S. 314 and *Goett v. Union Carbide Corp.*, 1960, 361 U.S. 340. To take the view that *Moragne* added a federal

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[2] Neither Guilbeau v. Calzada, La. App. 1970, 240 So. 2d 104, nor Hornsby v. The Fish Meal Co., 5 Cir 1970, 431 F. 2d 865, considered the damage issue presented here. Both cases found that, after *Moragne* the traditional admiralty doctrine of comparative negligence was applicable in suits for death in coastal waters. That doctrine replaced the Louisiana state doctrine that contributory negligence is a bar to relief, which, under the *Tungus*, had governed recovery for death in Louisiana waters. *Guilbeau* further held that the schedule of beneficiaries provided for in the Death on the High Seas Act would be adopted for suits for death in coastal waters. No discussion helpful to the resolution of the problem in this case accompanied that holding.

right while leaving the state remedy intact would provide some suitors with a choice of remedies, but the confusion created by the existence of federal and state remedies with differing rights, differing defenses, and differing limitation periods, and potentially different beneficiaries would not be abated. No state remedy now seems necessary for a violation of the federally imposed duties of the maritime law. See 90 S.Ct. at 1788 n. 15. The replacement of the state remedy by the federal one is forecast in *Moragne*:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. 90 S.Ct. at 1788.

in *Moragne* the Court concluded that the items of damage recoverable for maritime death would be best determined in case by case adjudication. Here the plaintiff pleaded and proved three items of damage. Although other items of damage were not specifically pleaded, they were proved without objection. The recoverability of each under maritime right will be considered separately. Thus, if an appellate court should decide that some items for which I have awarded damages were not correctly allowed, remand will be unnecessary.

Three separate groups of cases have considered similar problems and may be drawn on here: claims for the death of "blue water" seamen against their employers under the Jones Act; claims for the death of ship and plane passengers, true blue seamen against others than

their employers, and claims for the death of Sieracki seamen under the Death on the High Seas Act; and the host of cases under the various state wrongful death laws.

It appears premature to attempt to formulate one pervasive doctrine. But It is obvious that, unless a single national rule of damages is evolved, potential inequities, coupled with problems of fine distinctions will persist. If, for example, a vessel sank in Louisiana coastal waters, as a result of its unseaworthiness (coupled perhaps with the negligence of its master), resulting in the death of both a member of its ocean going crew, a passenger, and a longshoreman, claims by their representatives and survivors for the same items of damage should not be governed by different principles (though perhaps the right to recover might be governed by different principles (though perhaps the right to recover might be governed by different principles).

B. Loss of Support

Loss of support is recognized as a recoverable item of damages by all three bodies of law. National Airlines v. Stiles, 5 Cir. 1959, 268 F.2d 400 (Death on the High Seas Act); Norris, *The Law of Seamen*, 3d Ed. Sec. 697 (Jones Act); Harper and James, The *Law of Torts*, Sec. 24.2 (all state wrongful death statutes). Recovery for this item will be permitted.

The decedent was a widower. He was survived by his only daughter, Gabrielle Joan Dennis, who was 31 years of age at the time of the death of her father. Miss Dennis suffers from a schizophrenic reaction with border line

intelligence and is somewhat retarded. She has not been able to work for some years or to support herself, and she was totally and completely maintained by her father at the time of his death, as she had been throughout most of her life. She lived with her father who paid for everything she needed in life. She had no income. However, she inherited the duplex house in which she and her father lived. One side of this is her home and the other side yields her a modest rental income. No evidence was offered to show a loss of inheritance by reason of a shortening of the decedent's life.

Dennis was 61 years old when he died. His life expectancy, according to the 1967 tables of the United States Department of Health, Education and Welfare, was then 15.4 years. Civil Service regulations would have permitted him to work until 70, but, even so, his work life expectancy was something less than 9 years.

He had been earning $11,000 a year from his work as a marine surveyor. He had a Marine Engineers Beneficial Association pension of $4,000 per year, which terminated upon his death. Had Mr. Dennis lived, the pension would have continued for the rest of his life.

Mr. Dennis' income tax amounted to $2,843, leaving him a net economic income after taxes in the year of his death of $12,336. It is likely he would have had an income of this amount for not less than eight years, and thereafter an income of $4,000 for seven more years. It is also likely that he would have contributed equally generously to his daughter's support so long as he lived without reduction because of his own retirement. The evidence shows that Miss Dennis lives quietly, dresses

modestly, has no social engagements, and little medical expense. In my opinion, she has established an average loss of support of $1,800 a year for 15.4 years. Discounted at 5½% (an amount at which U.S. obligations can now be purchased) this amounts to $18,864.

C. The Decedent's Damages

The plaintiff has established certain items of damage suffered by the decedent and not by her: his conscious pain and suffering and the wages he lost between the time of the accident and his death. Not all states permit the survivors to recover these items, but a good many do and the number is constantly increasing. Harper and James at Sec. 24.2. The Jones Act permits such recovery. Hutchison v. Pacific-Atlantic Steamship Co., 9 Cir. 1954, 127 F.2d 384 and cases cited therein. The Death on the High Seas Act does not. Norris at Sec. 652 and cases cited therein.

It seems anomalous for the decedent's family to lose what the decedent could himself have collected had he filed a suit and prosecuted it to judgment during his life. There is no federal maritime policy against such recovery and some courts have permitted such recovery under the Death on the High Seas Act when the tortfeasor's state of domicile allowed it. See e.g. Canillas v. Joseph H. Carter, Inc., SDNY 1968, 280 F. Supp. 48. Recovery for these items will be permitted.

The decedent lingered from August 7, 1965 until April 21, 1966, a period of 8½ months. His sister testified that he often complained of pain and discomfort. He excreted large amounts of mucous and his sister had to

attend him constantly to clear his throat and thus prevent him from choking. The amount suggested by the plaintiff for this pain and suffering, $20,000, is reasonable and will be allowed.

During the 8½ months between the accident and his death, Dennis lost approximately $10,752.50 in gross income. The plaintiff will be permitted to recover this amount. See Anno. Damages-Considering Income Taxes, 63 ALR 2d 1393 (1957)

D. Funeral Expenses

The majority of states permit recovery for funeral expenses. Anno., Funeral expenses as an element of damages for wrongful death, 94 A.L.R. 438, 441. But it is not allowed under the Jones Act, Cities Service Oil Co. v. Launey, 5 Cir. 1968, 403 F.2d 537, or under the Death on the High Seas Act. The Culberson, 3 Cir. 1932, 61 F.2d 194; First National Bank v. National Airlines, S.D.N.Y. 1958, 171 F. Supp. 528. In denying recovery, the courts have found that these federal statutes have created new rights, and, by a rule of strict construction, have limited the scope of the recovery each allows. The rationale of the cases is that both statutes literally extend only to recovery of pecuniary losses of the survivors, and funeral costs are an expense of the estate rather than of the sorrowing relatives. Cities Service v. Launey, 5 Cir. 1968, 403 F.2d 537, 540; The Culberson, 3 Cir. 1932, 61 F.2d. 194, 195.

The right to recover these expenses has been recognized as a separate cause of action on behalf of the person who actually paid the bill in some states under the common

law. Anno. Common-law recovery of funeral expenses. 3 ALR 2d 932. Prior to *The Harrisburg*, recovery of these expenses was permitted under the general maritime law. See, e.g. Keene v. The David Reeves, D.C. Md. 1879, Fed. Cases No. 6625; Anno. Common-law recovery of funeral expenses, 3 ALR 2d 932. The overruling of *The Harrisburg* revives those cases as guides for decision here. It need not be decided whether the statutory language that appeared to deny recovery for funeral expenses against a background of maritime law that denied death actions continues to dictate this result when the horizon is bathed by the light of *Moragne*. This result need not be adopted for non-statutory *general maritime actions* post *Moragne*. Whether denominated an expense of the survivor or the estate, funeral costs represent an actual economic loss to the plaintiff. Recovery for the funeral bill, $923.43, will therefore be permitted.

E. Loss of Services

Both federal statutes permit recovery for pecuniary loss only. "Nevertheless, the word [pecuniary] as judicially adopted is not so narrow as to exclude damages for the loss of services of the [deceased]." Michigan Central R. Co. v. Vreeland, 1913, 33 S.Ct. 192, 196. See Sabine Towing v. Brennan, 5 Cir. 1936, 85 F.2d 478 rev'd on other grounds 57 S.Ct. 452; Prosser, The Law of Torts at 930. Unlike those for mental suffering, these damages can be definitely valued. *Michigan Central R. Co.*, 1913, 33 S.Ct. 192, 197. This item of recovery will be permitted.

The incidental services that Mr. Dennis provided his daughter were similar to the non-sexual services a hus-

band provides for his wife. Transportation, minor home repairs, assistance in shopping are but examples of these. The plaintiff will be permitted to recover $40 a month—$480 a year—for these, for the remainder of her father's life expectancy. Discounted at 5½&, this amounts to $5,030.40.

F. Survivor's Grief

Although the plaintiff pleaded this item of damage, she introduced no proof to show any actual suffering. The defendant introduced evidence that indicated that plaintiff's psychological difficulties restrict her emotional involvement in personal relationships. Since the damage has not been proved, recovery will be denied. For the same reason this is not an appropriate case to attempt to determine whether or not recovery should be permitted as a matter of law.

Therefore damages will be allowed as follows:

1)	Loss of Support	$18,864.00
2)	Decedent's pain and suffering	20,000.00
3)	Decedent's lost wages	10,752.50
4)	Funeral expenses	923.43
5)	Loss of Services	5,030.40
	TOTAL	$55,570.33

Interest will be allowed from the date of death. The plaintiff's counsel will prepare a form of judgment and review it with opposing counsel. This opinion will serve in lieu of findings of fact and conclusions of law.

This opinion supersedes the preliminary one previously circulated to counsel for comments.

B. RUBIN

United States District Judge

New Orleans, Louisiana

February 4th, 1971

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

FILED March 15, 1971

Civil Action No. 66-125 Section "C"

GABRIELLE JOAN DENNIS, INDIVIDUALLY AND IN THE ALTERNATIVE, ANNA MAE DENNIS MALET, WIDOW OF M. MALET, PETITIONER AND/OR CURATOR OF THE INTERDICT, GABRIELLE JOAN DENNIS

versus

CENTRAL GULF STEAMSHIP CORPORATION, AND/OR THE ABC CORPORATION, XYZ CORPORATION AND THE PDQ INSURANCE CORPORATION

JUDGMENT

Pursuant to the findings of fact and conclusions of law previously entered by this Court in February 4, 1971,

IT IS ORDERED AND DECREED that judgment is rendered in favor of Miss Cabrielle Dennis and against Central Gulf Steamship Corporation as follows:

1)	Loss of Support	$18,854.00
2)	Decendent's pain and suffering	20,000.00
3)	Decedent's lost wages	10,752.50
4)	Funeral expenses	923.43
5)	Loss of services	5,030.40
	TOTAL	$55,570.33

IT IS FURTHER ORDERED that judgment bear interest from date of death, April 21, 1966, at the rate of 5% until July 27, 1970 (effective date of Act No. 315, §1, of the 1970 Louisiana Legislature, changing rate of interest from 5% to 7%), and interest thereafter at the rate of 7% until paid.

IT IS FURTHER ORDERED that the defendant pay all legal costs of this proceeding.

New Orleans, Louisiana, this 15th day of March, 1971.

B. RUBIN

United States District Judge

APPROVED AS TO FORM.

Harold J. Lamy

Charles G. Jacques, Jr.
attorneys for Plaintiffs

Joan R. Peters, Jr.
Attorney for Defendant

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1969
Summary Calendar*

GABRIELLE JOAN DENNIS, Individually and in the Alternative, ANNA MAE DENNIS MALET, widow of M. MALET, Petitioner, and/or Curator of the Interdict, GABRIELLE JOAN DENNIS,

Plaintiffs-Appellees-Cross Appellants,

versus

CENTRAL GULF STEAMSHIP CORPORATION and/or the ABC CORPORATION, XYZ CORPORATION, and the PDG INSURANCE CORPORATION,

Defendants-Appellant-Cross Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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(January 4, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

DYER, Circuit Judge: In this appeal we are called upon to decide whether damages for a decedent's pain and suffering and funeral expenses, awarded by the court below, are available under the recent decisionally created federal right for wrongful death which occurs upon state territorial waters. We affirm.

Decedent Dennis was employed as a marine surveyor by the United States Maritime Administration. During the course of his official survey of the S.S. GREEN BAY, which was either owned or under demise charter to Central Gulf, he fell as he was descending a ladder in the forward part of No. 3 hold. This ladder was interrupted about four feet above the bottom of the hatch or tank top by angle irons that served as guard rails to protect a portion of the ship's piping. These guard rails, constructed at a slight angle to the tank tops, were situated so that one climbing down the ladder had to step backwards on the pipe guards prior to reaching the tank tops. None of the other ladders on the ship were obstructed in this manner.

Wolff, Central Gulf's Superintendent of Engineering, accompanied Dennis on his inspection. Wolff had descended the after ladder in No. 3 hold and had reached the tank tops when he saw Dennis coming down the forward ladder. Wolff directed the beam of his flashlight upon the guard rail as Dennis reached it and said, "Joe, you're on the guard." There was no indication that Dennis heard the remark. In the next moment Dennis stepped back and fell to the tank top, suffering serious injuries from which he died eight and one half months later.

Dennis' thirty-one year old daughter and sole survivor, Gabrielle, brought this action charging that Central Gulf furnished an unseaworthy vessel and was guilty of negligence. The district court found that Dennis was neither a seaman nor doing seaman's work and therefore not entitled to a warranty of seaworthiness, but the court found that Central Gulf was negligent in allowing an unsafe condition to exist aboard the vessel without providing an adequate warning.

Negligence

Central Gulf urges that the trial court clearly erred in finding negligence and lack of contributory negligence. It points out that the pipe guard condition was common to all C2-SB1 class vessels such as the one in question, and that at least one thousand ships of this class were constructed. It defends Wolff's conduct as non-negligent because he did not know that Dennis, a professional marine surveyor, was unfamiliar with the condition in No. 3 hold, nor did he know that Dennis would use the after ladder. Central Gulf also contends that Dennis was contributorily negligent because the district court found that Dennis did not descend the ladder with the utmost of caution. This finding, coupled with the fact that Dennis' purpose in being aboard was to search for and note any defects, it is argued, compels a finding of contributory negligence.

On the basis that negligence is not excused because it is often repeated, the district court found that the guard rail condition was unsafe despite the fact that

other vessels may have been constructed in a similar manner. The court also found that Dennis utilized the ladder in a normal fashion and was under no duty to use the utmost of caution because there was nothing to warn him of the unusual condition. We are unable to conclude that the findings of negligence on the part of Central Gulf and lack of contributory negligence on the part of Dennis are clearly erroneous. F.R.Civ.P. 52(a); *Bethlehem Steel Corp. v. Yates*, 5 Cir. 1971, 438 F.2d 798, 799. There is sufficient evidence to support the findings, *see Nuccio v. Royal Indemnity Co.*, 5 Cir. 1969, 415 F.2d 228, 229, and we are not left with a definite and firm conviction that a mistake has been made. *Union Oil Co. of California v. Tug Mary Malloy*, 5 Cir., 1969, 414 F.2d 669, 670-1.

Damages

From the date of *The Harrisburg*, 1886, 119 U.S. 199, until the decision in *Moragne v. States Marine Lines*, 1970, 398 U.S. 375, there was no right to recover for wrongful death under the general maritime law, although dependents of those who died in state territorial waters could sue in the federal courts in admiralty to recover under state wrongful death statutes. In *The Tungus v. Skovgaard*, 1959, 358 U.S. 588, both the right of recovery for wrongful death and the limitations on that right were held to be those established by state law. In *Moragne* the Supreme Court overruled *The Harrisburg* and held "that an action does lie under general maritime law for death caused by violation of maritime duties." *Id* at 409. It specifically reserved for future decision the beneficiaries who may be entitled

to recover, and the proper measure of damages to be awarded under the new federal right.

In limine we think it important to point out that Central Gulf does not challenge the right of decedent's daughter Gabrielle to bring this suit. The only issue raised is the proper measure of her damages.

The district court awarded damages to the decedent's daughter, Gabrielle Dennis, for loss of support, loss of services, decedent's loss of wages, pain and suffering prior to death and funeral expenses. Central Gulf objects to the award for pain and suffering and funeral expenses, contending that the uniformity dictated by *Moragne, supra,* is destroyed if those elements of damages are recoverable. Observing that neither decedent's pain and suffering nor funeral expense is allowed under the Death on the High Seas Act, *Brown v. Anderson-Nichols Co.*, D.Mass. 1962, 203 F.Supp. 489; *The Culberson*, 3 Cir. 1932, 61 F.2d 194, Central Gulf argues that there is a disparity between the measure of damages awarded by the district court for the wrongful death which occurs on inland waters, as compared to a non-seaman who suffers death on the high seas.

The spector of this disparity is largely illusory. While we agree that damages for pain and suffering are not recoverable under the Death on the High Seas Act we do not read the Act as excluding such recovery under another cause of action when death occurs on the high seas. *Dugas v. National Aircraft Corp.*, 3 Cir. 1971, 438 F.2d 1386, 1391; *see also Moragne v. States Marine*

Line, supra at 400. An action brought by dependents under the Death on the High Seas Act for a non-seaman decedent does not prevent the plaintiffs from recovering state survival damages in the same suit. *Dugas v. National Aircraft Corp., supra; Petition of Gulf Oil Corp.*, S.D.N.Y. 1959, 172 F. Supp. 911; *cf. The Hamilton*, 1907, 207 U.S. 398.

Even if a situation exists where the applicable state law does not provide damages for decedent's pain and suffering for a wrongful death on the high seas, this disparity does not destroy the uniformity mandated in *Moragne*. The "uniformity" that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries.

While "there is now a cause of action for wrongful death in admiralty that is not dependent on adjacent state law", *Hornsby v. Fish Meal Company*, 5 Cir. 1970, 431 F.2d 865, federal courts may look to state law and adopt it as the general maritime law if it is not inimical to the maritime law. *Romero v. International Terminal Operating Co.*, 1959, 358 U.S. 354, 391 n. 3 (Brennan, J., concurring). Indeed, when questions concerning the measure of damages require resolution *Moragne* points to the Death on the High Seas Act and the numerous state wrongful death acts that have been implemented with success as a persuasive analogy for guidance.

The decedent's conscious pain and suffering is not a pecuniary loss suffered by the decedent's beneficiaries, but most states, by survival action statutes, provide for the recovery of such damages. The federal courts have not hesitated to grant relief under state statutes when the death occurred on state territorial waters. *See Romero, supra* at 373. As *Moragne* teaches, it would be anomalous for us to take away a pre-*Moragne* remedy which was almost universally available by the application of state survival statutes when there is no federal maritime policy against such recovery. "'. . . [C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' [*The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (C.C.Md. 1865).]" *Moragne* at 387.

The maritime law permits an injured party to recover damages for his pain and suffering. *Heredia v. Davies*, 4 Cir, 1926, 12 F.2d 500, 501; *Vastano v. Partownership Brovigtank*, E.D.N.Y. 1957, 158 F.Supp. 477, 480. *Moragne* explained that,

> ". . . our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. In most respects the law applied in personal-injury cases will answer all questions that arise in death cases." *Id.* at 405-406.

In applying this formula we find damages for pain and suffering appropriate here. Recovery for this element of damage was properly permitted by the district court under the general maritime law.

Funeral expenses are in much the same category as pain and suffering. They, too, are not recoverable under the Death on the High Seas Act. Nevertheless, whether these expenses are payable by the estate or by the personal representative, it is a damage occasioned by the defendant's negligence or the unseaworthiness of his vessel. There is, of course, no modern precedent under the general maritime law for the recovery of this element of damage because until *Moragne* was decided there was no cause of action for wrongful death. The majority of states permit recovery for funeral expenses, Annot., 94 A.L.R. 438 (1935), and we perceive no reason why this should not be a proper element of damage under the general maritime law.

Central Gulf also charges the trial court with error in awarding pre-judgment interest. We find no abuse of discretion in the trial court's action. *National Airlines v. States*, 5 Cir. 1959, 268 F.2d 400, *cert. denied*, 361 U.S. 885.

Finally, Central Gulf contends that the evidence was insufficient to prove that Dennis' injuries proximately caused his death. This point was not presented to the district court and is raised for the first time on appeal. We decline to consider it. *D.H. Overmeyer v. Loflin*, 5 Cir. 1971, 440 F.2d 1213, 1215; *Wisconsin Barge Line*

v. Coastal Marine Transport, Inc., 5 Cir. 1969, 414 F.2d 872, 876.

By cross-appeal Gabrielle Dennis seeks reversal of the trial court's refusal to award her damages for loss of love and affection, otherwise known as survivor's grief. There was no proof of such damage. We agree with the trial judge that "This is not an appropriate case to attempt to determine whether or not recovery should be permitted as a matter of law."

The judgment of the district court is

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1969

GABRIELLE JOAN DENNIS, Individually and in the Alternative, ANNA MAE DENNIS MALET, widow of M. MALET, Petitioner, and/or Curator of the Interdict, GABRIELLE JOAN DENNIS,

Plaintiffs-Appellees-
Cross Appellants,

versus

CENTRAL GULF STEAMSHIP CORPORATION and/or the ABC CORPORATION, XYZ CORPORATION, and the PDG INSURANCE CORPORATION,

Defendants-Appellants-
Cross Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 4, 1972, 5 Cir., 1972, ____ F.2d ____).

(February 25, 1972)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

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Supreme Court, U.S.
FILED
AUG 31 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1536

CENTRAL GULF STEAMSHIP CORPORATION,
Petitioner,

versus

GABRIELLE JOAN DENNIS, Individually and in the Alternative, ANNA MAE DENNIS MALET, widow of M. MALET, Petitioner, and/or Curator of the Interdict, GABRIELLE JOAN DENNIS,
Respondent.

RESPONSIVE BRIEF ON BEHALF OF RESPONDENT, GABRIELLE JOAN DENNIS, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY CENTRAL GULF STEAMSHIP CORPORATION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO. _____

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner,

versus

GABRIELLE JOAN DENNIS, Individually and in the Alternative, ANNA MAE DENNIS MALET, widow of M. MALET, Petitioner, and/or Curator of the Interdict, GABRIELLE JOAN DENNIS,

Respondent.

RESPONSIVE BRIEF ON BEHALF OF RESPONDENT, GABRIELLE JOAN DENNIS, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY CENTRAL GULF STEAMSHIP CORPORATION

THE ISSUE PRESENTED TO THE COURT

The issue presented to the Court by the petition for writ of certiorari filed by Central Gulf Steamship Corporation is whether or not this Court in deciding Moragne v. State Marine Lines, 398 U.S. 375, provided for a survival of tort remedy as well as a

remedy for wrongful death under maritime law. In this context, by survival of tort remedy is meant a remedy for those damages sustained by the decedent before his death and inherited by his heirs, and in the case of wrongful death is meant those damages sustained directly by the heirs as the result of the death of the decedent.

The Fifth Circuit in affirming the district court opinion in this case found that the damages awarded to the plaintiff under the survival of tort remedy, namely, for the decedent's pain and suffering, his lost wages to date of death and the funeral expenses are almost universally awarded under state death statutes, and are also awarded under the Jones Act except for funeral expenses. The issue of whether or not the heirs in a maritime death action can recover for non-pecuniary items, such as loss of consortium, loss of love and affection or "survivors' grief" are elements of damage under a wrongful death recovery. These items of damage were not germane to this case and were not awarded by either the district court or the court of appeals.

These very real damages which harken for recognition will have to await another case for consideration.

The survival of tort remedy has both an historical and statutory legal basis and fulfills a compelling realistic need under modern maritime jurisprudence. Petitioner attempts to create a problem and conflict among the circuit courts of appeal when in fact there are none concerning the elements of damages awarded in this case. Petitioner contends that under the maritime law damages for wrongful death should be based on the

survivor's loss alone and cites as his basis for this the provisions of the Death on the High Seas Act. However, this would discriminate against the survivors of non-seamen and create a disparity among beneficiaries since under the Jones Act, 46 U.S.C., § 688, that statute provides for both wrongful death and survival of tort remedies for the heirs of seamen. In addition, historically, where the Death on the High Seas Act provided for the wrongful death recovery, the courts have used the appropriate state wrongful death statute for providing survival of tort damages. See Dugas v. National Aircraft Corp., 438 F 2d 1386 (3rd Cir. 1971). In discussing the Death on the High Seas Act, this Court clearly indicated that that Act was not a limiting one but rather an expanding one. It did not take away any benefits. It only extended the benefits in light of "The Harrisburg". In this connection, the Court said:

> ". . .To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law. . ." (26 L.Ed. 2d at 356)

Furthermore in an injury case recovery may be had for such things as pain and suffering, loss of wages and medical expenses. As the Fifth Circuit said in this case:

> "The maritime law permits an injured party to recover damages for his pain and suffering. Heredia v.

> Davies, 4th Cir., 1926, 12 F 2d 500, 501; Vastano v. Partownership Brovigtank, E.D.N.Y., 1957, 158 F. Supp., 477,480. Moragne explained that, 'our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. In most respects the law applied in personal injury cases will answer all questions that arise in death cases'. In applying this formula we find damages for pain and suffering appropriate here. Recovery for this element of damage was properly permitted by the district court under the general maritime law."

The argument of the petitioner in this case to deny survival of tort recovery to respondent would create a disparity and lack of uniformity among claimants in maritime law - the very thing that petitioner submits should be avoided.

The historical basis and compelling logic that led this Court to overrule The Harrisburg and conclude that there is a wrongful death action in American Maritime law applies equally as well to a survival of tort remedy.

In Ward v. Union Barge Line, 443 F 2d 563 (3rd Cir. 1971), the Third Circuit Court of Appeals made this observation concerning the Moragne decision and the survival of tort recovery as follows:

> "Last term the United States Supreme Court overruled The Harrisburg

> in Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L. Ed. 2d 339 (1970), squarely holding that 'an action does lie under general maritime law for death caused by violation of maritime duties'. 398 U.S. at 409, 90 S. Ct. at 1792. Although Justice Harlan's opinion primarily discusses the existence of a wrongful death action, the petitioner there had sought damages for pain and suffering as well as for wrongful death, and the opinion should erase any doubt concerning the survival of actions under the general maritime law."

In Marsh v. Buckeye Steamship Co. 330 F.Supp. 972, Chief Judge Battisti of the District Court of the Northern District of Ohio, stated on page 974 of his decision as follows:

> "Additionally, there is nothing that the defendants point out to us or that the Supreme Court says either impliedly or expressly to indicate that the survival rules may not be determined in accordance with applicable state rules or even that it might not be included in a court fashioned general maritime rule. . . it is only a small leap from the decision in Moragne to an acceptance of survival of personal injury actions as an integral part of the general maritime law."

Every case that has been decided since Moragne involving a maritime death has

provided for a survival of tort remedy. See Ward v. Union Barge Line Corp., 443 F 2d 563 (3rd Cir. 1971); Dennis v. Central Gulf Steamship Corp., 323 F Supp. 943 (E.D.La. 1971), affirmed 453 F 2d 137 (5th Cir. 1972); Marsh v. Buckeye Steamship Co., 330 F Supp. 972 (N.D. Ohio 1971); In Re Sincere Navigation Corp., 329 F. Supp. 652 (E.D.La. 1971); In Re Farrell Line, Inc. 339 F. Supp. 91 (E.D. La. 1971); United States Steel Corp. v. Lamp, 436 F 2d 1256 (6th Cir. 1970).

The petitioner makes reference to the civil law as distinguished from the common law to support its argument that damages sustained by the decedent should not survive to his heirs. It cites at page 8 of its brief several French writers as well as quotes from the Spanish law, Las Siete Partidas. It is submitted that the petitioner has misinterpreted the French and Spanish authorities or, at least those authorities are susceptible of a contrary interpretation. Pothier's own citation reveals that he is discussing the particular Roman delict (i.e. tort), known as injuria. Like early English law, early Roman tort law was primarily penal in nature. One of the nominate torts recognizing the laws of the Twelve Tables was that of injuriae. Injuria meant injury in the sense of offense to one's dignity, honor, etc. The law of the Twelve Tables provided that the plaintiff would be entitled to retribution in kind, lex talonis. Although this was obsolete by the time of Gaius, the harshness of the penal remedy resulted in the creation of an exception to the general rule of Roman law of survival actions in favor of the heirs of the decedent. This is set out by the following authorities:

Radin, Handbook of Roman Law (West:

1927) § 47, speaking of the actio furti (action for theft), "like all delictual actions, it survived the injured person, but not the wrongdoer." (emphasis added).

Id., § 48, p. 143, speaking of injuriae:

> "Another special point to notice in this action was the fact that it died completely with the person of either victim or wrongdoer, differing in this respect from other tort actions. . . If, however, litis contestatio had already been reached, that, as we remember, worked a procedural novation." (Emphasis added)

Nicholas, Roman Law, 210 (Oxford: 1962):

> "If the wrongdoer died before the [delictual] action was brought, it would not lie against his heir: the victim could claim to revenge himself only on the wrongdoer. (In the language of the civilians, the action was 'passively intransmissible.') On the other hand, if it was the victim who died, the action normally did lie (it was 'actively transmissible', but an exception was made in the case of the action for injuria, because of its peculiary vengeful character." (emphasis added)."

The general civil law of delict, unlike the exception discussed by Pothier and cited by petitioner, is derived from the Roman Lex Aquilia, which created a more general tort separate and distinct from the injuria, known as the damnum injuria datum, or the harm which gives rise to damage. Unlike the

exceptional tort injuria, the Aquilian action, as generalized in the course of Roman legal history, was mainly compensatory, rather than punitive (although it did provide that a defendant who refused to repair the injury he did to another before judgment had to pay double damages). Because of its nature this action, which became the generalized basis for a tort action at civil law, created a right that vested in the injured immediately upon suffering the harm. As a right of the injured, it formed a part of his patrimony as fully as any other right, and was fully inheritable by his heirs. (For the total separateness of the damnum injuria datum from the injuria, see Radin, pp. 144-148, § 49, Nichols, p. 218, Sohm, Institutes of Roman Law (Ledlie translation: 1901) § 85, pp. 434-438. For the derivation of the civil law of torts from the damnum injuria datum see Radin, § 51, pp. 151-152.)

It appears that the Spanish law cited, that of the laws of Las Siete Partidas 7:9: 11, 21 & 23, like Pothier, refer only to the exception to the rule and not to the general rule. This is evident from the importance given the joining of the suit (litis contestatio) in both Pothier and the Partidas. Moreover, one author has generalized upon the very provisions of the Partidas to reach a conclusion directly contrary to what the petitioner urges. See Voss, The Recovery of Damages of Wrongful Death at Common Law, at Civil Law and in Louisiana 6 Tulane Law Review, 201, 216.

In summary, it seems clear that Pothier was not stating that all tort actions abated upon death of the injured. He was speaking of one particular nominate tort grounded upon any intentional offense to one's dignity, the

tort of injuria. This exception to the general law in no way detracts from the general rule of civil law that the actions of a decedent passed to his heirs.

Recovery for the decedent's pain and suffering and the funeral expenses incurred by his death, resulting from the negligence of a tort feasor, were generally recoverable under state law and maritime law prior to the Harrisburg. The authorities for this statement are set out in the citations in the opinion of the district court as affirmed by the Fifth Circuit Court of Appeals in this case. As the Fifth Circuit said in its opinion in this case:

> "As Moragne teaches, it would be anomalous for us to take away a pre-Moragne remedy which was almost universally available by the application of state survival statutes when there is no federal maritime policy against such recovery. '. . . Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' (The Sea Gull, 21 F. Cas. 909, 910 (No. 12,578) (C.D. Md. 1865).) Moragne at 387."

As this Court pointed out in its Moragne decision, the Harrisburg was wrong in interpreting federal maritime law as negating an action for wrongful death. When expounding on the elements of damage under the Moragne death action, a court is certainly not restricted by the Death on the High Seas Act or any other statute that may have been

passed subsequent to the Harrisburg decision. In all probability had not the Harrisburg been decided, there would have been no need for the statutes on wrongful death and survival actions that have been passed since that decision. In fashioning the remedies for wrongful death and survival of tort actions under maritime law, this Court in its Moragne decision stated as follows:

> "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." 398 U.S. 375 at page 408.

This Court had earlier stated in its Moragne opinion that:

> "In most respects the law applied in personal injury cases will answer all questions that arise in death cases." 398 U.S. 375 at p. 405.

In conclusion, it is submitted that the Moragne decision of this Court provides for the survival of tort damages awarded in this case, and the opinion of the Fifth Circuit in this case should be affirmed. As Judge Rubin in quoting Chief Judge John Brown

said in his district court opinion. "The Admiralty has led, not followed."

Submitted,

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C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing responsive brief has been forwarded to Mr. Robert B. Acomb, Jr. of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 28th Floor, 225 Baronne Street, New Orleans, Louisiana 70112, attorneys for petitioner, Central Gulf Steamship Corporation, by U. S. mail, postage prepaid.

New Orleans, Louisiana, this 30th day of August, 1972.

Harold J. Lamy